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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BENSALEM TOWNSHIP; DAVID GARY COSTELLO; JOSEPH FRANCANO; JOHN J. MAHER, JR.; JOSEPH RYAN,

Petitioners,

vs.

BLANCHE ROAD CORPORATION, A PENNSYLVANIA CORPORATION, GENERAL PARTNER AND TRADING AS BLANCHE ROAD ASSOCIATES, I, A PENNSYLVANIA LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. In order to establish a Fourteenth Amendment substantive due process claim based upon the arbitrary and capricious conduct of local government employees, must a plaintiff show a deprivation of a property interest defined by state law?

2. Has a developer whose applications for land development permits were delayed by the arbitrary and capricious conduct of local government officials but who nonetheless received those permits within the time period established by state law suffered a deprivation of a property interest which is protected by the substantive component of the due process clause of the Fourteenth Amendment?

3. Does the doctrine of ripeness apply to a federal court's jurisdiction of a developer's substantive due process claim based upon arbitrary and capricious conduct in local land use regulation?

4. Does the doctrine of ripeness bar a federal court's jurisdiction of a developer's substantive due process claim for lost profits on lots where the developer did not request development permits from the local government's final decision-making entity?

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REPORTED OPINION

The opinion of the Court of Appeals in this case appears at 53 F.3d 592.

STATEMENT OF JURISDICTION

Petitioners seek review of the order and opinion of the United States Court of Appeals for the Third Circuit filed on May 26, 1995.

By order dated June 21, 1995, the Court of Appeals denied the petitions for rehearing of petitioners.

On July 14, 1995, the Court of Appeals ordered that, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, its mandate was stayed until July 28, 1995.

By order dated July 21, 1995, the Court of Appeals ordered that the stay of its mandate was extended until August 11, 1995.

This Honorable Supreme Court has jurisdiction of the instant petition pursuant to 28 U.S.C. §1256. The Court of Appeals had jurisdiction of this matter pursuant to 28 U.S.C. §1291. The District Court had jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. §1983.

LEGAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

53 Pennsylvania Statutes Section 4104(a):

A municipality which regulates the construction, erection, maintenance, operation or repair of buildings, structures or devices by means of an ordinance requiring the filing of an application, the payment of a fee and the issuance of a permit shall render a decision either approving or disapproving the application for a permit within 90 days after the application is filed unless the ordinance requires a decision within a lesser period of time, provided that any disapproval of the application shall be issued within said 90-day period containing a brief explanation setting forth the reasons for said disapproval and the manner in which the application can be corrected and/or modified to obtain the required approval. If no decision is rendered on the application within 90 days, the application shall be deemed to be approved and the permit shall be deemed to have been granted immediately, unless the applicant has agreed in writing to an extension of time. No agreement to extension of time for action may be made a part of an application form nor may any such agreement be required of any applicant under threat of denial of the application.

STATEMENT OF THE CASE

Procedural History

Petitioners adopt the procedural history in the Opinion of the Court of Appeals. (A-17-21)

Statement of Facts[1]

Bensalem Township is located in Bucks County in southeastern Pennsylvania. Bensalem Township is a Second Class Township, i.e. a population density of less than 300 persons per square mile. During the relevant time period, the chief legislative and executive body of Bensalem Township was a Board of Supervisors. The Board consisted of five elected Supervisors who were responsible for the "general administration of the affairs of the Township". 53 Pa.C.S.A. 65510. Supervisors in Bensalem Township were not full-time employees. They were paid $4,000.00 per year. They met every other Monday evening in a public meeting which was open to all citizens. The Supervisors did not have individual executive or legislative authority; they could only act sitting as a body of the whole at public meetings. 53 Pa.C.S.A. 65512, 65513. The Pennsylvania Second Class Township Code authorizes second class townships to retain professional consultants such as a Township Solicitor and a Township Engineer. 53 Pa.C.S.A. 65581 and 65585. These professionals are not employees of the Township; they provide services upon request and are paid for those services.

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[1]The statement of facts; although concise,is lengthy. Most land use regulation cases arise at the beginning of the land development process, such as a zoning change or an application for subdivision approval. The instant case involves the actual development of a 23 lot subdivision over three years with multiple conflicts arising over the issuance of land alteration, building and use and occupancy permits for the individual lots.

In 1972, Blanche and Adam Talacki received approval from Bensalem Township to subdivide an unimproved tract of land into 32 separate lots. Mr. and Mrs. Talacki developed only 9 lots. On May 2, 1986, Mr. and Mrs. Talacki formed a partnership with Margaret and Walter Czekay with the intent of completing the development of the tract. The partnership was named "Blanche Road Associates" and the tract was named "Blanche Road Industrial Park."[2] Blanche Road Associates (hereinafter "Respondent") intended to erect industrial warehouses on the remaining 23 lots.

The Talackis retained ownership of the 23 undeveloped lots. Respondent purchased from the Talackis one lot, Lot 29, and separate options to purchase each of the remaining 22 lots. The term of each option was four years. Respondent built, on speculation, an industrial warehouse on Lot 29 and sold Lot 29 as an improved lot. Respondent then exercised its option, and purchased and developed 11 more lots. However, Respondent and the Talackis did not renew the options when they expired on May 2, 1990. Respondent ceased further development work in 1990 leaving 13 lots undeveloped. Respondent developed Lots 7, 8, 10, 12, 13, 14, 15, 25 and 26 (the "Developed Lots"). Respondent did not develop Lots 6, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27 and 34 (the "Undeveloped Lots"). (DL-4)[3]

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[2]Blanche Road Associates was a limited partnership with Mr. and Mrs. Talacki and Mr. and Mrs. Czekay being the limited partners. The Talackis and the Czekays also formed a corporation, Blanche Road Corporation, which became the general partner for Blanche Road Associates.

[3]Petitioners have lodged with the Court several documents which could not be included in the Appendix because of their size and configuration. Petitioners wish to bring these documents to the Court's attention, and they are cited with the prefix "DL" for "documents lodged."

The Bensalem Township Zoning Ordinance provides that after subdivision approval, a developer must obtain three permits to complete development of each lot - a land alteration permit, a building permit and a use and occupancy permit. Land alteration permits were issued by the Board of Supervisors while building and use and occupancy permits were issued by the Department of Licenses and Inspections. The permitting process in Bensalem Township is accurately described in the Court of Appeals Opinion at A-9-10.

Respondent claimed that employees of Bensalem Township arbitrarily and capriciously interfered with the permitting process, causing delays in the development of the Developed Lots and losses of $596,000.00. More importantly, Respondent claimed that it was so discouraged and stressed by the arbitrary and capricious conduct of Bensalem Township in dealing with the Developed Lots, it chose to close up operations, not renew the option agreements and simply walk way from Undeveloped Lots, leaving them completely undeveloped. Respondent seeks lost profits for the Undeveloped Lots in the amount of $8.1 million! The total claim was $8.7 million. (A-40-42)[4]

For 1992, 1993 and 1994, Bensalem Township's general fund revenues were $8.8 million, $12.2 million and $11.4 million, respectively.[5] General fund revenues are non-dedicated revenues available to the Township to provide services such as police, recreation and code enforcement. Respondent's total damage claim of approximately $8.7 million, together with recoverable counsel fees of at least $1 million,

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[4]A-40-42 is taken from Respondent's Final Pretrial Order filed prior to the second trial pursuant to Eastern District of Pennsylvania Local Rule 21(d)(2)(b).

[5]Bensalem Township's budgetary figures were not exhibits at either trial. However, they are a matter of public record.

would, if successful, render Bensalem Township unable to provide government services, including police services, for an entire year.

Although Respondent originally presented substantive due process claims, procedural due process claims and equal protection claims, the procedural due process claims and equal protection claims were dismissed by the District Court and Respondent has not appealed that dismissal. Only the substantive due process claim is at issue in this Petition.

Bensalem Township does not have a local ordinance which establishes a time limit in which to approve land use permit applications. However, Pennsylvania has a "deemed approval" statute which requires a municipality to act on a land use permit application within 90 days or the application is deemed approved. 53 Pa.C.S.A. 4104. (A-39) The deemed approval statute is enforceable by an action in mandamus. Rodier vs. Township of Ridley, 595 A.2d 220 (Cmwlth. 1991).

Petitioners have prepared a Table which shows the permit history for most of the developed lots, i.e., when each of the three permits was applied for and when they were granted. (DL-5) The record is silent as to the permit dates for some developed lots, which silence is indicated in the Table by the acronym "NITR" (not in the record).

The Table shows the application dates for 21 permits.[6] Seventeen were approved within 90 days and four were approved after 90 days. The record does not show the dates for the three permits for Lot 29 or the land alteration and building permits for Lot 7. Because these lots were successfully

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[6]The use and occupancy Permit for Lot 7 is not included because Respondent actually used and occupied the lot before applying for a permit. The date for Land Alteration and Building permits is always the same because respondent always applied for those permits simultaneously.

developed, it is likely that these permits were timely issued. Therefore, it is probable that 5 more permits were timely issued (3 for Lot 29 and 2 for Lot 7) so that the likely figures are 23 permits issued within 90 days and 4 permits issued after 90 days. Bensalem Township's compliance rate was therefore 85%. Respondent never filed an action in mandamus to compel the issuance of the 4 late permits; however, they were issued anyway.

Respondent introduced at trial 12 permits which were issued to other applicants in less than 90 days. However, during the period that Respondent was actively developing lots (1987 through 1990), Bensalem Township received at least 2,000 applications for land alteration permits. There was no testimony from any witness to establish a custom or practice in Bensalem Township to approve permit applications in less than 90 days.[7] Accordingly, Respondent did not prove an entitlement to receive permits in less than 90 days.

The alleged arbitrary and capricious conduct of Bensalem Township employees, as described in the Opinion and, where appropriate, supplemented from the record, is as follows:

1. THE MEMO On May 27, 1987, Respondent applied for land alteration and building permits for Lot 13. The applications were initially rejected and the Fire Marshall placed a note in the file which read:

> C.W.-S.II-No sprinklers-can you get them on something else?

However, the permits were granted in July of 1987, within the 90-day period. Respondent did not claim any damages with

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[7]Respondent had ample opportunity through extended discovery before both trials to find such evidence but was unable to do so.

respect to Lot 13 for any delay in the issuance of these permits. Whatever the meaning of the note, it caused Respondent no harm.

2. THE IMPACT TAX On October 15, 1987, Respondent applied for land alteration and building permits for Lots 14 and 26. The permits were held up by the Department of Licenses and Inspections ("L&I") for Respondent's failure to pay an impact tax. On June 15, 1987, Bensalem Township adopted an Ordinance which assessed commercial developers an impact tax of $.80 per square foot of proposed floor area. Respondent claimed an exemption from the tax because the subdivision approval in 1972 preceded its enactment.

The legal issue of whether the tax applied to Respondent was submitted to the Township Solicitor who issued an informal opinion that Respondent was correct. L&I then waived the impact tax and permits were issued in November of 1987. Respondent did not claim any damages with respect to Lots 14 and 16 for any delay in the issuance of these permits. By simply "appealing" to the Township Solicitor, Respondent ameliorated the initial unsatisfactory decision of L&I.

3. THE THREAT In December of 1987, Walter Czekay met with the Director of L&I, Mr. Staerk, the Township Engineer, and the Township Zoning Officer. According to Mr. Czekay, Mr. Staerk threatened that if Respondent did not pay impact fees, Mr. Staerk would stop construction. However, there was no testimony that Mr. Staerk ever took such action. No witness testified that he was asked or instructed by Mr. Staerk to take any action unfavorable to Respondent.

4. THE ENVIRONMENTAL ISSUE On December 22, 1987, a Code Enforcement Officer in L&I, William Oettinger, issued a stop work order for all construction. As of December 22, 1987, the lots under construction were 13, 14 and 26. Mr. Oettinger based his stop work order on violations of erosion and sedimentation control measures which were conditions of the land alteration permits issued for those lots.

Although respondent contested the validity of the stop work order, the Opinion states: (A-21)

> Moreover, it is undisputed that erosion and sedimentation control violations did exist in the Industrial Park area when the stop work orders were issued.

The Bucks County Conservation District ("BCCD"), an agency of the Pennsylvania Department of Environmental Resources, inspected the Industrial Park on January 27 and February 22, 1988 and both times found violations of state administrative regulations for erosion control. (DL-6,7) On February 8, 1988, Mr. Oettinger revoked the land alteration and building permits for Lots 13, 14 and 26 upon the recommendation of the Township Solicitor which stated:

> In light of the above, we have recommended that all existing permits, both alterations of land and building, be revoked, due to the current violations of state and local law. Along with enforcement of the Bucks County Conservation District, we believe this is the only method which will force compliance in this case.

On February 18, 1988, Respondent filed an action in state court to force the reissuance of the permits.[8] On February 26, 1988, Bensalem Township agreed to the reissuance of the permits in exchange for Respondent's agreement to comply with the soil erosion requirements of the BCCD. This Agreement was recorded in a court-approved Stipulation, which was a negotiated victory for both sides. (A-66-70) Respondent received its permits and Bensalem Township received assurance that Respondent would respect the environment. Like the

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[8]The Opinion at A-13 states that the state court action was filed on February 28, 1988. The correct date was February 18, 1988.

impact fee dispute, negotiation produced an amelioration of an initial conflict.

5. THE LAND ALTERATION vs. LAND DEVELOPMENT DISPUTE When Respondent filed applications for land alteration permits for Lots 8, 10, 11, 12, 15 and 21[9], the Township Engineer recommended to the Board of Supervisors that the applications be denied because Respondent had not complied with the Bensalem Township 1982 Land Development Ordinance. (A-71-78)[10] The requirements of the Land Development Ordinance were considerably more onerous than those of the Land Alteration Ordinance.

The Township Engineer, Mr. Scheuren, testified that he applied the Land Development Ordinance at the direction of three Supervisors, Mr. Ryan, Mr. Costello and Mr. Maher, and that they asked Mr. Scheuren to "slow down" Respondent's development because of their personal dislike for Walter Czekay. Mr. Scheuren was the only witness who testified that the three Supervisors expressed personal animosity against Respondent. Mr. Scheuren's credibility was impaired by the fact that he had been convicted of the state court crime of False Swearing (18 Pa.C.S.A. 4903) and was sentenced to a prison term.

Respondent disagreed with the Township Engineer's recommendation on the theory that the 1972 subdivision gave respondent a "grandfather" exemption from the 1982 Land

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[9]Lot 10 is a parking lot which is adjacent to Lot 8.

[10]A-71-78 are three of the letters of the Township Engineer citing failure to comply with the Land Development Ordinance.

Development Ordinance.[11] Land alteration permits are issued by the Board of Supervisors. Respondent appeared before the Board of Supervisors to request that they disregard the recommendation of the Township Engineer and issue the land development permits. The Board of Supervisors, including Mr. Ryan, Mr. Costello and Mr. Maher, agreed and unanimously voted to approve all of the disputed alteration permits. The Board of Supervisors approved the land alteration permit application for Lot 12 on June 6, 1988 and for Lots 8, 10, 11, 15 and 21 on April 17, 1989.

The stenographic transcription of the proceedings from the April 17, 1989 meeting of the Board of Supervisors (A-42-65) shows that Respondent and its counsel negotiated directly with the Township Solicitor to achieve a settlement of the permit dispute. Respondent agreed to add several "notes" to the plans for the lots under consideration, whereupon the Board of Supervisors unanimously approved the permits. Like the disputes over the impact tax and environmental violations, negotiation produced a compromise which was satisfactory to both sides.

6. CONDITIONAL BUILDING PERMITS In 1988, Bensalem Township retained a new Township Solicitor and the issue of the impact tax re-surfaced. The application of the impact tax to Respondent's development was openly discussed at the April 17, 1989 Board of Supervisors meeting. The parties agreed to defer the issue of the applicability of the tax and for Bensalem Township to issue the building permits without

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[11]Respondent's position was of questionable validity. In 1972, Pennsylvania allowed developers only three years to complete a subdivision and retain immunity from subsequent zoning legislation. Because the Talackis did not complete their subdivision by 1975, they were then subject to further zoning legislation by Bensalem Township and, in particular, the 1982 Land Development Ordinance. 52 Pa. C.S.A. 10508 (4), Atland v. Sprenkle, 472 A.2d 275 (Cmwlth. 1981).

Respondent paying the tax. On May 1, 1989, the Township Solicitor wrote to Respondent's counsel and stated:

> (1) The Township will not revoke the building permits merely for non-payment of the tax at this time; (2) The Township will not withhold a Certificate of Occupancy merely on the basis of the non-payment of the tax; (3) The Township and the Developer reserve rights to file declaratory judgment actions to test the validity of the taxing ordinance as it is related to any construction after the effective date of the original Ordinance and/or any subsequent amendments.

L&I then issued building permits for Lots 8, 12, 15 and 21 with the following legend:

> This is a conditional permit only. Bensalem Township reserves its' right to collect contributions due and owing to the Township Highway Improvement Funds because the extension contract for the subject development was approved after the effective date of Ordinance No. 367, adopted June 15, 1987, as amended.[12]

The Pennsylvania Municipalities Planning Code ("Code") includes under the generic heading of "Zoning" regulation of the construction of buildings. 53 Pa. C.S.A. 10603(b)(2). Therefore, action taken by L&I in response to an application for a building permit is a determination by a "zoning officer" within the meaning of the Code. 53 Pa.C.S.A. 10909.1. Determinations by a zoning officer on an application for a building permit are appealable to the township Zoning

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[12]The "conditional" building permit for Lot 21 is at DL-6.

Hearing Board for a de novo review.[13] 53 Pa. C.S.A. 10909.1(a)(3). In Taylor Investment, Ltd. vs. Upper Darby Township, 983 F.2d 1285 (3rd Cir. 1993), the Court held that the Zoning Hearing Board is the municipal entity in Pennsylvania with "finality" for the issuance of building permits.

If Respondent believed that the legend on the building permits would cause it harm, Respondent had the opportunity to appeal to the Zoning Hearing Board and request removal of the legend. However, Respondent did not appeal.

7. LOT 7 Mr. Scheuren testified that one of the Supervisors, Mr. Maher, instructed him to prepare a "punch list" before the issuance of a use and occupancy permit for Lot 7 and to look for every possible code violation and environmental violation. However, Mr. Scheuren admitted that he was not asked by the Supervisors to prepare any dishonest comments and that, although he carefully scrutinized Lot 7, his recommendations were fair and accurate.[14]

The dispute over the punch list for Lot 7 was amicably resolved through negotiation and included in the court-approved Stipulation which also resolved the environmental dispute. (A-

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[13]Under Pennsylvania law, a township Zoning Hearing Board is an independent entity separate and apart from other institutions of township government. 53 Pa. C.S.A. §10901 et seq.

[14]The "issue" of the use and occupancy permit for Lot 7 was actually a non-issue because Respondent suffered no damages from the punch list. Lot 7 was a rental property where Respondent erected two commercial warehouses and rented them to tenants. Respondent allowed both tenants to commence occupancy before Respondent obtained a use and occupancy permit. During the entire dispute over the punch list, the warehouses were occupied and the tenants paid rent.

66-70) Respondent agreed to correct most of the items on the punch list in exchange for Bensalem Township's agreement to issue the use and occupancy permit.

The history of conflict between Respondent and Bensalem Township, as described above, is more typical than terrible. Except for the conditional building permits for Lots 8, 12, 15 and 21, all disputes were resolved promptly and through negotiation. Respondent's anticipated profit for the Undeveloped Lots alone was $8.1 million. It was not unreasonable to expect Respondent to spend some time negotiating disputed issues. The only dispute not resolved to Respondent's satisfaction, the conditional building permits, was not submitted to the next higher authority, the Zoning Hearing Board. The record demonstrates Bensalem Township's willingness to negotiate with Respondent and, when asked, to ameliorate any initial decision which Respondent deemed harsh or unfair.

ARGUMENT

I. The Court Of Appeals Erred By Concluding That Respondent's Substantive Due Process Rights May Have Been Violated In The Absence Of Deprivation Of Any Protected Property Interest.

The Court of Appeals determined that Respondent had a substantive due process right to the issuance of permits by Petitioner township in less time than issuance is mandated under state or local law. In so doing, the court expressly bypassed state law governing the issuance of permits and extended the substantive due process protection of property interests in a manner contrary to the precedents of this Court.

The principle that due process concerns arise only in relation to the deprivation of protected rights is rooted in the language of the Constitution. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law..." This language echoes the Fifth Amendment guarantee against such deprivations by the federal government.

Nowhere does the Constitution establish due process protection as an independent right available for the enforcement of general notions of fairness. Rather, that protection is derivative, in the sense that it comes into play only when an individual's right to his or her life, liberty or property is at stake. Regents of University of Michigan v. Ewing, 474 U.S. 217, 222-23, 106 S.Ct. 507, 511-12 (1985)(arbitrary deprivation of protected property interest constitutes substantive due process violation); Parratt vs. Taylor, 451 U.S. 527, 537-38, 101 Supreme Court 1908, 1913 (1981)(deprivation of property without due process of law violates Fourteenth Amendment); Board of Regents of State College vs. Roth, 408 U.S. 564, 571, 92 Supreme Court 2701, 2705 (1972)(due process requirements apply only to the deprivation of protected liberty and property interests).

While Parratt and Roth address procedural claims, this Court left no doubt in Ewing that, although not all property interests give rise to substantive constitutional protection, it is the arbitrary deprivation of a protected interest that gives rise to a substantive due process violation. 474 U.S. at 22-23, 106 S.Ct. at 511-12.

Respondent claims a substantive due process violation based upon the arbitrary and capricious conduct of local government. However, arbitrary and capricious conduct in and of itself does not perfect a substantive due process claim. In addition to improper conduct, a plaintiff must also establish a deprivation of a property interest protected by the Fourteenth Amendment. The two step process for proving a substantive due process claim has been described by the Eleventh Circuit in Reserve, Ltd. v. Town of Longboat Key, 17 F.3rd 1374, 1379 (11th Cir.1994), as follows:

> First, was the plaintiff deprived of a constitutionally protectible property interest? [...] Second, assuming a property interest, was the deprivation of that "property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and ... without any rational basis[?]" Hearn v. City of Gainsville, 688 F.2d 1328, 1332 (11th Cir.1982).

(First bracket added, second in original.)

To establish the parameters of a constitutionally protected property interest in a substantive due process claim, the Eleventh Circuit relied on this Court's decision in Roth, supra, at 408 U.S. 564, 577, 92 S.Ct. 2701, 2709:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and

that support claims of entitlement to those benefits.

53 Pennsylvania Statutes, Section 4104 provides permit applicants--and Pennsylvania municipalities--with a limit on the time issuance or rejection of a permit may take. Pursuant to Section 4104, an applicant has automatic or deemed approval of any permit whose application is not issued or denied within 90 days.

Section 4104 is the only Pennsylvania authority that governs the time for issuing such permits. Bensalem Township does not have an Ordinance on the subject.

Of the more than 20 permits of record for which Respondent applied before abandoning its development, only 4 were issued after the expiration of the 90 day statutory period. No formal demand was made to the township regarding these delayed permits, which were issued promptly when Respondent's principal pointed out that he believed he had grounds for a mandamus action.

Nonetheless, the Court of Appeals determined that Respondent had made out a prima facie case that township officials deliberately and arbitrarily delayed issuance of all the permits and ordered this case remanded for a third trial on plaintiff's claims of substantive due process.

The Court of Appeals bypassed a determination of whether plaintiff had been deprived of a protected property interest. Absent from the Opinion is any mention of the property right upon which the court bases its conclusion that Respondent stated a viable claim. Pursuant to this Court's decision in Roth, the source of such a property right is necessarily state law: but, as noted, neither Pennsylvania nor Bensalem Township requires that permit applications be approved or denied in less than 90 days.

The Court of Appeals states (A-30):

> The "deemed approved" statute, however, does not foreclose damages based upon intentional delays in the issuance of permits. One need only consider a hypothetical situation in which officials, seeking to sabotage a developer's project, intentionally withheld each permit for 89 days or for an even longer period until the applicant would take legal steps. Such deliberate and arbitrary delays could cause significant additional expense to the developer.

The concern of the court regarding possible abuse of discretion by permitting officials, while understandable, is not based upon a property right to issuance of permits in less than 90 days. To the contrary, the Pennsylvania Legislature has accorded Commonwealth citizens a right to permit approval only after the 90 day period has expired without any action by the municipality. No applicant is entitled to issuance or denial of a permit under Pennsylvania law in 89 days, or in 88 days, or in any lesser amount of time, regardless of whether the determination could be made earlier.

The 90 day period is designed to insure municipalities sufficient time in which to make permit decisions. The Township Engineer of Bensalem Township testified that more than 2,000 applications for land alteration permits alone (not counting applications for building permits and use and occupancy permits) were submitted to him from mid-1987 to early 1990, when almost all of Respondent's development activity took place. The sheer number of these applications supports the wisdom of the Pennsylvania legislature in selecting 90 days as an appropriate time period to make permit determinations and provide a buffer against deemed approvals and/or lawsuits by impatient developers. Notably, respondent does not contend that the 90-day limit in the deemed approval statute is constitutionally unacceptable.

In effect, the Court of Appeals has created for Respondent a property right or entitlement where none existed so as to implement general considerations of fairness under the rubric of substantive due process. Moreover, it unaccountably contradicted its previous opinions, which left little doubt that the determination of a protected property interest is indispensable for a due process violation. DeBlasio v. Zoning Board of Adjustment, 53 F.3rd 592 (1995) (fundamental property interests are protected by substantive due process); Taylor Investment, Ltd. v Upper Darby Township, 983 F.2d 1285, 1292 (3rd Cir.1993)(substantive due process plaintiff must show deprivation of protected property interest by arbitrary and capricious act); Bello v. Walker, 840 F.2d 1124 (1988)(arbitrary and capricious act depriving plaintiff of right to permits established by state court states substantive due process claim).

By eliminating the need to prove a deprivation of a property interest defined by state law, the Court of Appeals made liability turn solely on Petitioners' alleged improper motivation. However, the Constitution does not require that local government officials love or even like their constituents. The Constitution protects property interests, not municipal goodwill. Conduct which does not cause a deprivation of a protected property interest, no matter how mean-spirited, is not sufficient to establish a substantive due process claim.

Arguably, plaintiff's allegations of intentionally disparate treatment of its permit applications within the 90 day period might support an equal protection claim. However, plaintiff chose not to appeal the dismissal of its equal protection claims in the first trial of this matter. Nor, after two trials of this case, each preceded by a discovery period, has plaintiff been able to produce legally sufficient evidence indicating that permitting officials regularly issued permits to other developers

in substantially less time than to plaintiff -- much less to developers similarly situated to plaintiff.[15]

In sum, the Court of Appeals erred in concluding that respondent's claims of delay are grounded in any legitimate entitlement to the permits and that it could have been deprived of its substantive due process rights by their issuance in less than 90 days.

II. The District Court Correctly Applied The Ripeness Doctrine To Preclude Respondent From Recovering Damages For Those Lots Where Respondent Did Not Request Permits From Bensalem Township's Final Decision-Making Authority.

The Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government. Daniels vs. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986). The Courts of Appeal have developed the doctrine that arbitrary and capricious conduct by local government officials which deprives a land owner of a protected property interest constitutes a substantive due process violation. Edie v. Sarasota County, 908 F.2d 716, 721-2 (11th Cir. 1990), Bello v. Walker, 840 F.2d 1124, 1128-30 (3rd Cir. 1988), South Gwynnett Venture v. Pruitt, 491 F.2d 5,7 (5th Cir. 1974).

In 1985, this Court in Williamson County Regional Planning Commission vs. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116 (1985) applied the doctrine of ripeness to a claim for damages from local land use regulation. This Court stated:

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[15]Plaintiff introduced at the second trial a mere twelve permits, out of the thousands issued during the time of its development activities, issued in less time than its own.

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Since Williamson, several Courts of Appeal have applied the ripeness requirement to substantive due process claims based upon alleged arbitrary and capricious conduct in local land use regulation. In Landmark Land Company of Oklahoma, Inc. vs. Buchanan, 874 F.2d 717 (10th Cir. 1989), a developer alleged that local government officials conspired with Air Force officers to impede and ultimately prevent the commercial development of its property. The allegations of a malicious conspiracy in Landmark are similar to Respondent's allegations of a malicious conspiracy existing in Bensalem Township. The Tenth Circuit applied Williamson and rejected the claim as unripe. The court stated:

> Landmark could recover on its substantive due process claim if it could show that Del City deprived it of property in an arbitrary fashion....Before a federal court may step in and ascertain whether a local planning authority has taken property arbitrarily, however, it must allow the local authority a chance to take final action. Until it has a final action before it, the court is unable to calculate whether property was taken and whether the local authority's position was arbitrary. Thus, the Williamson County ripeness test applies with equal force to substantive due process claims.

Id., at 722.

Landmark was followed by the Second Circuit in Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992). In Southview, the Court stated:

> Southview's substantive due process claim premised on arbitrary and capricious government conduct, however, is subject to only the final decision prong of the Williamson ripeness test. Unless a court has a final decision before it, it cannot determine whether a claimant was deprived of property and whether the government conduct was arbitrary and capricious.

Id., at 96-97.

The Ninth Circuit, in Herrington vs. Sonoma County, 834 F.2d 1488, 1494 (9th Cir. 1987) and the Eleventh Circuit in Edie, supra, also applied Williamson to a substantive due process claim based upon arbitrary and capricious conduct.

In the instant case, Respondent did not apply for any permits for Lots 6, 16, 17, 18, 19, 20, 22, 23, 24, 27 and 34. Bensalem Township was not given an opportunity to determine how it would apply its permitting process to these lots and certainly was never given an opportunity to approve permit applications. Respondent's damage claim for lost profits for these lots is $6.5 million. (A-40-42)

For Lot 11, Respondent applied for land alteration and building permits on January 18, 1989, which permits were approved on April 17 and April 28, 1989 respectively. Respondent never applied for a Use and Occupancy Permit and never constructed a building on the property. Respondent's claim for damages for lost profits on Lot 11 is $568,000.00.

For Lot 21, Respondent applied for land alteration and building permits on December 20, 1988, which permits were approved on April 17 and April 25, 1989 respectively.

Respondent never applied for a use and occupancy permit and never constructed a building on the property. Respondent's claim for damages for lost profits for Lot 21 is $1 million.

Respondent seeks damages from Bensalem Township of $1.6 million for Lots 11 and 21 where all permits applied for were granted. Respondent seeks damages from Bensalem Township of $6.5 million for Lots 6, 16, 17, 18, 19, 20, 22, 23, 24, 27 and 34 where no permits were applied for, and therefore none denied. Respondents seek a total of $8.1 million from Bensalem Township for all of the Undeveloped Lots where the Township never denied a permit application and approved every permit that was requested.

As the District Court concluded, the ripeness requirement precludes Respondent from recovering for the Undeveloped Lots (except Lots 11 and 21) because there never was a final decision as to Respondent's right to develop those lots because no permits were ever applied for. The ripeness doctrine also precludes Respondent from recovering for Lots 11 and 21 because Bensalem Township did not make an unfavorable decision on the permits requested (land alteration and building) and was not given an opportunity to make a final decision on the third permit -- use and occupancy.

In the instant case, the Third Circuit has held that ripeness is not required for the following reason (A-29-30):

> For the reasons that follow, however, the ripeness requirement arising in zoning dispute cases does not apply to Blanche Road's claims and, consequently, Defendants' Rule 50(a) Motion should not have been granted...In the instant case, however, plaintiffs' claims are not dependent on a final decision from the county, since plaintiffs are not appealing from an adverse decision on a permit application. Footnote 14 [14. In fact, virtually all of plaintiffs' permit applications were ultimately

> approved.] Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. Such actions, if proven, are sufficient to establish a substantive due process violation, actionable under Section 1983, even if the ultimate outcome of plaintiffs' permit applications was favorable... This is a substantively different type of claim than that presented in the ripeness cases, and internal review of the individual permit decisions is thus unnecessary to render such a claim ripe.

Upon approval of the subdivision, Respondent needed only the issuance of three permits (land alteration, building and use and occupancy) to complete the development of each lot. Therefore, interference by Bensalem Township employees in Respondent's development plans was necessarily an interference with the issuance of permits. The Opinion tacitly admits that the "interference" of Petitioners was an interference with the issuance of permits by stating (A-29-30):

> Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. [Emphasis supplied]

The Opinion holds that where the initial permit interference is arbitrary and capricious, the claim is instantly ripe and that "internal review of the individual permit decisions

is thus unnecessary." However, there is no logical reason why an initial permit decision based on arbitrary and capricious conduct cannot be ameliorated when reviewed by the final decision-maker in the same way that initial decisions of benign origin can likewise by ameliorated. Indeed, the instant case demonstrates that initial adverse permit decisions, even if motivated by impermissible ill will, can be subsequently ameliorated to the satisfaction of the property owner.

The ripeness doctrine enunciated in Williamson counsels the parties to be patient. In local land regulation, it is not uncommon that an initial unfavorable determination is ameliorated in subsequent proceedings. The Federal Courts should not rush to judgment by stepping in at a preliminary or even intermediate phase of local land use regulation. The finality requirement gives local government the opportunity to reconsider what may have been an initial rash decision and come to a more moderate and well-reasoned decision.

An analysis of the evidence shows that preliminary denials of permits were subsequently ameliorated when Respondent requested a review by a second or final decision-maker. The areas of conflict described in the Statement of Facts were mostly conflicts over the issuance of permits which conflicts were resolved as follows:

1. The Memo. The memo was issued in the context of an initial denial of all three permits. The permits were subsequently issued within the 90-day period although the record is silent as to how they came to be issued.

2. The Impact Tax. The dispute over the impact tax caused L&I not to issue land alteration and building permits. The tax was removed and the permits were issued when Respondent sought a review by the Township Solicitor who issued an informal opinion in Respondent's favor.

3. The Threat. The threat by Mr. Staerk was a non-issue because there was no testimony that Mr. Staerk

personally took any action adverse to Respondent or directed or even asked any Bensalem Township employee to take action adverse to Respondent.

4. The Environmental Issue. Because of Respondent's undisputed environmental violations, the Township Solicitor recommended revocation of permits for Lots 13, 14 and 26 and those permits were revoked by L&I on February 8, 1988. On February 18, 1988, Respondent filed an action in state court which led to a negotiated settlement and a re-issuance of the permits on February 26, 1988.[16]

5. The Land Alteration vs. Land Development Dispute. The Township Solicitor recommended that Respondent's land alteration permit applications be rejected because Respondent had not complied with the Land Development Ordinance. However, the final decision-maker for land alteration permits was the Board of Supervisors and when Respondent took the matter to the Board of Supervisors, Respondent prevailed and the Board of Supervisors approved the permits.

6. Conditional Building Permits. When the impact tax issue re-surfaced, the parties negotiated an amicable resolution which provided for the issuance of the permits without Respondent paying the impact tax. L&I then issued the building permits with a legend stating that the permit was a "conditional" permit. The Zoning Hearing Board was the final decision-maker with respect to building permits but was never

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[16]In Agins v. City of Tiburon, 447 U.S. 255, 263, 100 S.Ct. 2138, 2143, Fn. 9, this Court held that fluctuations in the value of real estate during the process of governmental decision-making are, absent extraordinary delay, merely incidents of ownership. Therefore, any loss claimed by Respondent during the short delay while the parties sorted out the resolution of Respondent's environmental violations should not be compensable.

asked by Respondent to remove the legend. Respondent could have appealed to the Zoning Hearing Board but failed to do so.

7. Lot 7. The dispute over the issuance of a use and occupancy permit for Lot 7 was resolved in the Court-approved Stipulation of February 26, 1988. The amicable resolution expressed in the Stipulation was that Respondent would correct certain items on the punch list whereupon the use and occupancy permit would issue.

The record in the instant case demonstrates the wisdom of the ripeness requirement. Good faith negotiation will resolve most local land disputes without the need for premature Court intervention.

The amicable resolution of the land alteration/land development issue is the best example of the wisdom of the ripeness requirement. Even if Mr. Scheuren were correct and the Supervisors engaged in a hallway conspiracy with Mr. Scheuren to slow down Respondent's development by applying the Land Development Ordinance, when the Board of Supervisors acted in its capacity as the final decision-maker, the Board approved the land alteration permits without requiring compliance with the Land Development Ordinance. (A-71-78) When Respondent brought the issue up at a public meeting, the alleged conspirators dissolved their conspiracy and rendered a decision favorable to respondent. Respondent accomplished in two hours on a Monday evening the same result which might otherwise have taken two years of litigation and counsel fees in the hundreds of thousands of dollars. To say that resolution of this issue at the local government level is preferable to federal court litigation is to state the obvious.

The decision of the Third Circuit to dispense with the need for ripeness whenever the landowner claims arbitrary and capricious misconduct would be a disaster for local government. Developers and local land use regulators are frequently embroiled in controversy. Local land use regulators are traditionally loath to allow commercial development which

endangers the environment or displeases existing property owners who seek to preserve the status quo. If a developer can run to Federal Court every time a permit is denied, local governments will be swamped with litigation and bankrupted by legal fees. If a developer has a "ripe" claim merely upon the denial of a permit and the allegation of arbitrary and capricious conduct, developers will be able to bully local governments with the club of threatened litigation and through economic pressure force local governments into unwarranted capitulation. The ripeness doctrine forces developers and local land use regulators to sit down and "reason together" rather than race to the Courthouse.

Respondent's claim for delay damages for the lots it developed was only $600,000. By walking away from the development and choosing not to develop the remaining 13 lots, Respondent catapulted its claim to $8.7 million.

The failure of the Third Circuit to apply the doctrine of ripeness to the instant case leads to the extraordinary result that Bensalem Township may incur a liability of $6.5 million for alleged lost profits on lots where the developer never submitted one single permit application. The Township was never given an opportunity to permit development of these lots and is nevertheless being subjected to a liability of $6.5 million, more than 50% of its annual General Fund Revenue. The Township is also being subjected to additional liability for Lots 11 and 21, in the amount of $1.6 million, where it granted all of the permits requested.

The Second, Ninth, Tenth and Eleventh Circuits have all applied the doctrine of ripeness to substantive due process claims based upon arbitrary and capricious conduct. In the instant case, the Third Circuit has held that arbitrary and capricious conduct is a substantively different type of claim than the claims to which the doctrine of ripeness applies. However, there is no logical reason why the requirement of finality should not apply to initial decisions based on arbitrary and capricious motivation as compared to legitimate motivation. Decisions

based on either motivation may be ameliorated by appeal to a final decision-maker and it is that amelioration which the doctrine of ripeness encourages.

Because initial decisions in local land use regulation are so frequently ameliorated upon further consideration and submission to the final decision-making authority, the doctrine of ripeness furthers the purposes of judicial economy and protects local governments from being overwhelmed by the cost of litigation or coerced into capitulation by the threat of litigation. Even if an initial decision is based upon arbitrary and capricious conduct, local governments must be entitled to review that decision and correct it before they are exposed to the potentially enormous liability of a developer's claim for loss of profits because of an "inability" to develop its land.

CONCLUSION

For all the above reasons, petitioners respectfully request this Honorable Supreme Court to grant the instant petition.

Respectfully submitted,

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